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Supreme Court, U.S.
FILED
JUN 18 1985
ALEXANDER L. STEVAS
CLERK

ORIGINAL

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

No. 84-6859

RONALD DERAY SKIPPER,

Petitioner,

v.

STATE OF SOUTH CAROLINA,

Respondent.

PETITIONER'S REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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In his petition for a writ of certiorari, petitioner has cited a lengthening series of death penalty decisions by the South Carolina Supreme Court which demonstrate a serious and continuing disregard of this Court's decisions concerning the scope of mitigating evidence admissible in capital sentencing proceedings. State v. Koon, ___ S.C. ___, 328 S.E.2d 625 (1984), cert. denied, 105 S.Ct. 2056 (1985); State v. Patterson, ___ S.C. ___, 327 S.E.2d 650 (1984), cert. denied, 105 S.Ct. 2056 (1985); State v. Chaffee, ___ S.C. ___, 328 S.E.2d 464 (1984), cert. denied, 105 S.Ct. 1878 (1985); State v. Skipper, ___ S.C.___, 258 S.E.2d 58, cert. filed (U.S., June 3, 1985) (No. 84-6859); State v. Elmore, Opinion No. 22322 (S.C., May 16, 1985). Because the trial judge refused in this case to permit petitioner to present to the sentencing jury competent evidence concerning the likelihood that he would make a nonviolent and co-operative prisoner if sentenced to life imprisonment, respondent correctly recognizes that it must defend on its merits the South Carolina Supreme Court's view that a convicted murderer's likely future conduct in prison is irrelevant as a matter of law in the determination of

his sentence. The state's one-paragraph effort to present such a defense is significant, however, only for its failure to cite or acknowledge even a single capital decision of this Court. Instead, the state of South Carolina appears to rely on two South Carolina Supreme Court cases, State v. Koon, supra, and State v. Plath, 281 S.C. 1, 313 S.E.2d 619, cert. denied, 104 S.Ct. 3560 (1984), which embody precisely the constitutional error at issue in this case. Brief in Opposition at 3.[1]

Respondent's other line of defense is its insistence that the excluded testimony of three neutral witnesses--two of them law enforcement officials--was rendered "cumulative" by the fact that petitioner himself and members of his family were permitted to attempt to convince the jury that petitioner's jail record was good. The predicate for this assertion, as for the decision of the South Carolina Supreme Court affirming petitioner's death sentence, was that the excluded evidence was admissible only as evidence of petitioner's general character, and not as evidence tending to establish his future nondangerousness in a prison environment--a subject which both respondent and the South Carolina court continue to regard as irrelevant. See Patterson v. South Carolina, 105 S.Ct. 2056, 2059 n. 5 (1985) (Marshall, J., dissenting from denial of certiorari). Even accepting this clearly unconstitutional predicate, the assertion is without merit.[2] Indeed, not

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[1]It might also be observed that the state's position appears to be only that a jury need not consider mitigating evidence concerning a capital defendant's future conduct in prison. At petitioner's trial neither the state nor the trial judge saw anything irrelevant in the prosecution's assertions that petitioner had been badly-behaved while incarcerated in the county jail, that he had probably committed homosexual rapes while serving a previous prison term, and that he was likely to do so again unless sentenced to death. Tr. 1201-1202, 1213.

[2]Accepting respondent's definition of cumulative evidence as "additional evidence of the same kind to the same point," it can readily be seen that the excluded evidence was neither of the same kind nor to the same point as the testimony of petitioner and of his mother and ex-wife. The excluded testimony was different in kind because it was testimony of neutral witnesses who had actually observed petitioner in a jail setting over an extended period of time, rather than that of biased family members testifying on the basis of little or no firsthand knowledge of petitioner's actual conduct. And the evidence was to different point both because it was offered in part to establish petitioner's future nondangerousness

even the South Carolina Supreme Court itself labelled the excluded evidence here as "cumulative." Rather, it noted simply that "evidence of [petitioner's] past adaptability [to prison] was admitted through testimony of his former wife, his mother and his own testimony." State v. Skipper, ___ S.C. ___, 328 S.E.2d 58, 62 (1985). In an opinion filed on the same day as the petition for writ of certiorari in this case, the South Carolina Supreme Court has explained that it will affirm death sentences marred by the identical Lockett error as is involved here when the excluded testimony was cumulative or "when the appellant had ample opportunity to present nonstatutory mitigating circumstances." State v. Plemmons, Opinion No. 22338 (S.C., June 3, 1985). Thus even noncumulative, relevant and admissible mitigating evidence may, according the South Carolina Supreme Court, be erroneously excluded from capital sentencing proceedings without compromising the constitutionality of a death sentence, so long as some other nonstatutory mitigating evidence was admitted. Since the excluded evidence in this case was not "cumulative" in any normally accepted sense of that word, it would appear that the South Carolina Supreme Court's affirmance of petitioner's death sentence was based not on a finding of "cumulativeness," but rather on its recently-articulated principle of appellate review which holds that a death sentence may be carried out so long as the sentencing authority was permitted to consider some of the reasons why it should not be.

In defense of the South Carolina Supreme Court's rather freewheeling approach to appellate review of Lockett error, respondent stresses that in State v. Stewart, 283 S.C. 104, 321 S.E.2d 447 (1984) the South Carolina court did actually reverse a death sentence due to the erroneous exclusion of testimony concerning a capital defendant's good behavior in jail. What respondent fails to note is that the defendant in Stewart presented no other

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in confinement--a subject which South Carolina regards as irrelevant--and because it also sought to establish petitioner's actual record of good behavior in jail through the objective testimony of jail officials, rather than his family's opinion of his subjective attitude toward confinement.

mitigating testimony whatsoever, thus precluding the South Carolina Supreme Court's usual determination on appeal that a "sufficient" amount of mitigating evidence had been considered by the sentencing jury. State v. Elmore, Opinion No. 22322 (S.C., May 16, 1985), cf. State v. Plemmons, supra, State v. Patterson, ___ S.C. ___, 327 S.E.2d 650 (1984), cert. denied, ___ U.S. ___, 105 S.Ct. 2056 (1985). Indeed, the result in Stewart only serves to illustrate the arbitrary and paradoxical nature of South Carolina's method of appellate review of Lockett claims. In Stewart, the defendant had been convicted of an exceptionally brutal murder of an elderly widow committed in the course of burglary, sexual assault, and robbery. In aggravation, the prosecution proved that Stewart had committed three similar break-ins and violent assaults on three other elderly ladies both before and after the murder, and that he also had an extensive record of prior criminal convictions including a violent robbery attempt against an elderly woman, larceny, and escape from prison. Other than his jail record which was erroneously excluded, Stewart offered no evidence whatsoever in mitigation of his punishment. On these facts, without any consideration of the weight of the evidence as a whole, the South Carolina Supreme Court held that the exclusion of the jail record was reversible error. State v. Stewart, supra. However, in every other case where the South Carolina Supreme Court has found a Lockett violation to have occurred, some mitigating evidence was considered by the jury, and in every such case the South Carolina court has cited the existence of this evidence as its reason for declining to reverse the death sentence. State v. Plemmons, Opinion No. 22338 (S.C., June 3, 1985), State v. Elmore, supra, State v. Patterson, supra, State v. Skipper, supra. Since the South Carolina Supreme Court has by its own account chosen to focus solely on whether other mitigating testimony was considered by the sentencer in order to determine whether Lockett error requires reversal, State v. Elmore, supra, the effect of South Carolina's mode of appellate review has been

to grant relief in precisely those situations (of which Stewart is the only example to date) in which the error is least likely to have affected the outcome. At the same time, by affirming death sentences infected by Lockett error because of the presence of substantial other mitigating evidence, the South Carolina court has apparently failed to recognize that the existence of this other mitigating evidence may well have rendered the sentencing jury's decision a close one, and might thus have rendered the Lockett error especially important to the outcome.

The irrationality of this mode of appellate review is compounded by the South Carolina Supreme Court's failure to include in its harmless-error calculus any recognition of the weight of the evidence in aggravation of punishment. Cf. Connecticut v. Johnson, 460 U.S. 73, 95 (1983) (Powell, J. dissenting) ("it is only by assessing the weight of the evidence against the defendant that the effect of the error can be judged"). Thus in Stewart the state court reversed a death sentence imposed for an exceptionally brutal murder committed by a defendant with a lengthy record of similar violent crimes. In State v. Patterson, supra, by contrast, it found Lockett error to be harmless where the defendant's crime was unpremeditated and impulsive, where the victim died almost instantaneously, and where the defendant had no prior record of violence. The present case provides another example of the capriciousness of South Carolina's mode of Lockett review. Here the state's evidence showed that the victim voluntarily accompanied the defendant to a secluded area, and was seen embracing and kissing him shortly before her death. No weapon was employed, and the victim suffered no aggravated battery in excess of that required to effect the rape and murder. The evidence of rape--the sole statutory aggravating circumstance--was entirely circumstantial and was rather weak. Indeed, the state's entire case against petitioner was circumstantial, a fact which may in and of itself have militated against imposition of the death penalty. In mitigation, petitioner introduced extensive testimony concerning

his traumatic and violent childhood, cf. Eddings v. Oklahoma, 455 U.S. 104 (1982), as well as evidence of the effect of alcohol and drug addition, and his efforts to seek professional help for these problems prior to the murder. All of these circumstances are plainly reasons to doubt that the erroneous exclusion of relevant mitigating evidence can now be determined to have been harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967). But under South Carolina's mode of appellate review explicated in State v. Elmore, Opinion No. 22322 (S.C., May 16, 1985) and applied in this case, the South Carolina Supreme Court treated the circumstances of the crime as irrelevant to its harmless-error analysis, and the existence of substantial mitigating circumstances as a reason to uphold the death sentence rather than to reverse it.

Petitioner recognizes that under normal circumstances, "harmless error 'is a question more appropriately left to the courts below." Francis v. Franklin, 105 S.Ct. 1965, 1977 n. 10 (1985) (quoting Connecticut v. Johnson, supra, 460 U.S. at 102 (Powell, J., dissenting)). However, the method of appellate review by which state courts undertake constitutional harmless-error analysis is itself a federal constitutional issue, Chapman v. California, supra, and will often prove crucial to the effective enforcement of constitutional guarantees. For the reasons set forth above and in his petition for writ of certiorari, petitioner submits that his case presents a situation in which the both the South Carolina Supreme Court's firmly-entrenched misreading of Lockett v. Ohio and its persistent failure to apply federal constitutional principles of harmless-error analysis to death penalty sentencing proceedings call for review and correction by this Court.

CONCLUSION

The writ should be granted.

Respectfully submitted,

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June 17, 1985